No. 11062.

IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

ALFRED LLOYD SAUNDERS,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

APPELLEE'S BRIEF.

CHARLES H. CARR,
United States Attorney;

JAMES M. CARTER,
Assistant United States Attorney;

WILLIAM STRONG,
Special Assistant to the United States Attorney;

WM. P. HAUGHTON,
Assistant United States Attorney;

United States Postoffice and Courthouse Bldg., Los Angeles (12),
Attorneys for Appellee.

Parker & Company, Law Printers, Los Angeles. Phone TR. 5206.

TOPICAL INDEX.

TABLE OF AUTHORITIES CITED.

No. 11062.

IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

ALFRED LLOYD SAUNDERS,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

APPELLEE'S BRIEF.

Jurisdiction.

The United States District Court for the Southern District of California had jurisdiction of the cause under Section 311 of the Selective Training and Service Act of 1940, 54 Stat. 885 (50 U. S. C. App. 311) and Section 24 of the Judicial Code (28 U. S. C. 41 (2)). The offense charged in the indictment was committed in the County of Los Angeles, State of California, within the jurisdiction of the District Court. This Court has jurisdiction of the appeal under Section 128 of the Judicial Code (28 U. S. C. 225 (a) and (d)).

Statutes and Regulations Involved.

Sections 10(a)(2) and 11 of the Selective Training and Service Act of 1940, 54 Stat. 893, as amended Dec. 5, 1943, c. 342, 57 Stat. 597 (50 U. S. C. App. 310-311) provide:

Section 10:

"Administrative provisions

(a) The President is authorized—

* * * * * * * * *

(2) to create and establish a Selective Service System, and shall provide for the classification of registrants and of persons who volunteer for induction under this Act on the basis of availability for training and service, and shall establish within the Selective Service System civilian local boards, civilian appeal boards, and such other agencies, including agencies of appeal, as may be necessary to carry out the provisions of this Act. There shall be created one or more local boards in each county or political subdivision corresponding thereto of each State, Territory, and the District of Columbia. Each local board shall consist of three or more members to be appointed by the President, from recommendations made by the respective Governors or comparable executive officials. No member of any such local board shall be a member of the land or naval forces of the United States, but each member of any such local board shall be a civilian who is a citizen of the United States residing in the county or political subdivision corresponding thereto in which such local board has jurisdiction under rules and regulations prescribed by the President. Such local boards, under rules and regulations prescribed by the President, shall have power within their respective jurisdictions to hear and determine, subject to the

right of appeal to the appeal boards herein authorized all questions or claims with respect to inclusion for, or exemption or deferment from, training and service under this Act of all individuals within the jurisdiction of such local boards. The decisions of such local boards shall be final except where an appeal is authorized and is taken in accordance with such rules and regulations as the President may prescribe. Appeal boards within the Selective Service System shall be composed of civilians who are citizens of the United States. The decision of such appeal boards shall be final in cases before them on appeal unless modified or changed by the President as provided in the last sentence of section 5(1) of this Act. No person who is an officer, member, agent, or employee of the Selective Service System, or of any such local or appeal board or other agency, shall be excepted from registration, or deferred from training and service, as provided for in this Act, by reason of his status as such officer, member, agent, or employee."

Section 11: Offenses and punishment.

"Any person charged as herein provided with the duty of carrying out any of the provisions of this Act, or the rules or regulations made or directions given thereunder, who shall knowingly fail or neglect to perform such duty, and any person charged with such duty, or having and exercising any authority under said Act, rules, regulations, or directions who shall knowingly make, or be a party to the making, of any false, improper, or incorrect registration, classification, physical or mental examination, deferment, induction, enrollment, or muster, and any person who shall knowingly make, or be a party to the making of, any false statement or certificate as to the fitness or unfitness or liability or non-liability of himself or any

other person for service under the provisions of the Act, or rules, regulations, or directions made pursuant thereto, or who otherwise evades registration or service in the land or naval forces or any of the requirements of this Act, or who knowingly counsels, aids, or abets another to evade registration or service in the land or naval forces or any of the requirements of this Act, or of said rules, regulations, or directions, or who in any manner shall knowingly fail or neglect to perform any duty required of him under or in the execution of this Act, or rules or regulations made pursuant to this Act, or any person or persons who shall knowingly hinder or interfere in any way by force or violence with the administration of this Act or the rules or regulations made pursuant thereto, or conspire to do so, shall, upon conviction in the district court of the United States having jurisdiction thereof, be punished by imprisonment for not more than five years or a fine of not more than $10,000, or by both such fine and imprisonment, or if subject to military or naval law may be tried by court martial, and, on conviction, shall suffer such punishment as a court martial may direct. No person shall be tried by any military or naval court martial in any case arising under this Act unless such person has been actually inducted for the training and service prescribed under this Act or unless he is subject to trial by court martial under laws in force prior to the enactment of this Act. Precedence shall be given by courts to the trial of cases arising under this Act."

Section 633.21 of the Selective Service Rules and Regulations, provides:

"633.21. Duty of registrant to report for and submit to induction. (a) When the local board mails to a registrant an Order to Report for Induction (Form

150), it shall be the duty of the registrant to report for induction at the time and place fixed in such order. If the time when the registrant is ordered to report for induction is postponed, it shall be the continuous duty of the registrant to report for induction upon the termination of such postponement and he shall report for induction at such time and place as may be fixed by the local board. * * *"

"(b) Upon reporting for induction, it shall be the duty of the registrant: * * * (5) to submit to induction * * *."

Statement of the Case.

On about April 18, 1945, appellant was indicted in the United States District Court for the Southern District of California, Central Division in one count [R. 2-3], charging violation of the Selective Training and Service Act of 1940 (*supra*, p. 2), in that he wilfully, knowingly, and unlawfully failed and neglected to submit to induction into the Armed forces of the United States after having been duly notified and ordered to do so, thereby willfully and unlawfully failing and neglecting to perform a duty required by him under the Act and the rules and regulations promulgated pursuant to it.

Appellant, on May 2, 1945, filed a demurrer to the indictment, which in substance challenged the sufficiency of the indictment on the ground that it purported to state a violation of the Act and the applicable regulations, which appellant contended, were violative of his constitutional rights in that he was, by the order of the draft board forced to report and submit to induction, and forced to serve in the armed forces although he was a conscientious objector, and that the question of whether he was in

fact a conscientious objector had been determined by the local draft board adversely to the appellant, whereas, the appellant contended, such a determination could only be made by himself and not by the local draft board [R. 5-10].

On May 7, 1945, the district judge overruled the demurrer [R. 10-11] and appellant thereupon entered a plea of not guilty to the indictment (id.). On May 7, 1945, also, appellant, appearing *pro. per.* [R. 2-3], although he was duly advised of his right to have counsel appointed on his behalf and to a trial by jury, declined counsel and waived a jury trial [R. 11, 23, 29, 30]. During the proceeding, however, the trial court requested two local counsel who were present in the courtroom to consider the rights of the appellant and called upon them for their opinion as to the correctness of appellant's proposed steps and position [R. 28-29.

On May 8, 1945, appellant was tried before the district court without a jury [R. 11-12, 30-46] and, after the introduction of testimony by the Government and by appellant [R. 12, 31-46], as well as following denial of appellant's motions for a directed verdict, the district court found appellant guilty of the violation charged in the indictment. [R. 42.] This case was thereupon referred to a probation officer for investigation and report to be made on May 21, 1945 [R. 12-13, 42].

On May 21, 1945, the district court sentenced appellant to imprisonment for a term of 18 months [R. 14-15, 46].

Appellant filed notice of appeal, together with his grounds of appeal, on May 22, 1945 [R. 15-16], and filed an assignment of errors on June 11, 1945 [R. 49-50].

Summary of Facts.

There is no dispute as to the facts in the instant case.

Pursuant to the provisions of the Selective Training and Service Act of 1940 [R. 31], appellant registered, and thereafter filed a Selective Service questionnaire with his local draft board [R. 31-32]. At the same time appellant filed a conscientious objector's form, notifying his local draft board that he considered himself to be a conscientious objector, and requested that he be classified accordingly [R. 35-36, 37].

On May 22, 1944 appellant was classified by his local draft board in Class I-A (available for military service), and notice of such classification was mailed to him on the following day [R. 32]. Thereafter, appellant appealed from his local board's classification to the Selective Service appeal board, which also classified appellant in Class I-A [R. 32], after appellant had been accorded a hearing upon his claim for a conscientious objector's status [R. 37-38 40-41; Gov. Exh. 6] and the hearing officer had reported that he did not consider appellant to be a conscientious objector under the Act [Gov. Exh. 6].

On December 10, 1944, the local draft board sent to appellant an order to report for induction on January 2, 1945 [R. 32; Gov. Exh. 4]. Pursuant to the order, appellant reported on January 2, 1945 to the induction center, and was asked to return on January 5, 1945, which he did [R. 33]. At the induction center appellant advised that he did not intend to submit to induction inasmuch as he was a conscientious objector. Appellant departed from the induction center without being inducted [R. 33].

At the trial appellant sought a review of the draft board's classification and offered evidence which he conceived to be in support of his contention that he was improperly classified by the draft boards [R. 34-35].

ARGUMENT.

Appellant's basic contentions in this case are: (1) that the district court erred in failing to review appellant's classification accorded him by the Selective Service boards; and (2) that the local draft board and the appeal board, by classifying him Class I-A, rather than as a conscientious objector (Class I-A-O, or Class IV-E), violated his rights under the First Amendment to the Constitution guaranteeing him freedom of religion. Appellant is in error in both respects.

It is settled, of course, that the propriety of a registrant's classification by the Selective Service boards under the Selective Training and Service Act, is not reviewable upon a criminal prosecution for failure to comply with the orders of the local board. *Falbo v. United States,* 320 U. S. 549. In that case the Supreme Court stated in part (pp. 553-555):

> "The connected series of steps into the national service which begins with registration with the local board does not end until the registrant is accepted by the army, navy, or civilian public service camp. Thus a board order to report is no more than a necessary intermediate step in a united and continuous process designed to raise an army speedily and efficiently.
>
> "In this process the local board is charged in the first instance with the duty to make the classification of registrants which Congress in its complete discretion saw fit to authorize. Even if there were, as

the petitioner argues, a constitutional requirement that judicial review must be available to test the validity of the decision of the local board, it is certain that Congress was not required to provide for judicial intervention before final acceptance of an individual for national service. The narrow question therefore presented by this case is whether Congress has authorized judicial review of the propriety of a board's classification in a criminal prosecution for wilful violation of an order directing a registrant to report for the last step in the selective process.

"We think it has not. The Act nowhere explicitly provides for such review and we have found nothing in its legislative history which indicates an intention to afford it. The circumstances under which the Act was adopted lend no support to a view which would allow litigious interruption of the process of selection which Congress created. To meet the need which it felt for mobilizing national manpower in the shortest practicable period, Congress established a machinery which it deemed efficient for inducting great numbers of men into the armed forces. Careful provision was made for fair administration of the Act's policies within the framework of the selective service process. But Congress apparently regarded 'a prompt and unhesitating obedience to orders' issued in that process 'indispensable to the complete attainment of the object' of national defense. Martin v. Mott, 12 Wheat, 19, 30. Surely if Congress had intended to authorize interference with that process by intermediate challenges of orders to report, it would have said so.

"Against this background the complete absence of any provision for such challenges in the very section providing for prosecution of violations in the civil courts permits no other inference than that Congress did not intend they could be made."

And in *Enge v. Clark,* 144 Fed. (2d) 638, a *habeas corpus* proceeding, this Court adopted the holding in the *Falbo* case, and stated (p. 639):

"The petition contends that appellant's imprisonment is (1) illegal and in violation of the provisions of the Selective Training and Service Act of 1940, and the Rules, Regulations, and Orders thereunder; (2) illegal by virtue of arbitrary, discriminatory, unfair, capricious enforcement and administration of said Act; and (3) illegal in that it deprives the appellant of due process of law as guaranteed by the Fifth Amendment to the Constitution.

"Similar alleged error in the action of the Board was held not available as a defense in a criminal prosecution for failure to perform a Board's order to report for induction into the armed forces in Falbo v. United States, 320 U. S. 549, 64 S. Ct. 346. Appellant seeks to distinguish the Falbo decision on the ground that in the instant case direct relief is sought in this habeas corpus proceeding before trial under the indictment. While there is such a difference between the two cases, we are of the opinion that the ratio decidendi of Falbo v. United States controls here."

Consequently, the district court had no power to review appellant's classification by the Selective Service boards, and appellant had no right to raise that issue upon the trial in the criminal prosecution for failure to obey the draft board's orders.

There is likewise no merit to appellant's contention that the Selective Service boards lack power to pass on his claim to classification as a conscientious objector. In this respect, appellant appears to base his argument upon the theory that since the determination would involve a matter of religion, the factual findings necessarily involved are beyond the power of the administrative boards under the Act. It is settled, of course, that exemption from military service is a matter of legislative discretion rather than Constitutional mandate. *United States v. Macintosh,* 283 U. S. 605, 622; *Hamilton v. Regents,* 293 U. S. 245, 263-264; *Rose v. United States,* 129 F. (2d) 204, 210 (C. C. A. 6). Consequently, it is plain that no Constitutional barrier exists in respect to delegating the fact finding function with reference to the registrant's conscientious objector status to the Selective Service boards, and, as recognized in the *Falbo* decision, 320 U. S. 549, and Section 10(a)(2) of the Selective Training and Service Act, Congress has appropriately delegated that function to such boards.

Under the *Falbo* decision, the sole issue at appellant's trial was whether he knowingly failed to comply with the order of his draft board. On that issue the Government's proof was conclusive, and is not now in dispute.

Conclusion.

No questions of law or fact exist in this case which would adversely affect the judgment below. The judgment should be affirmed.

Respectfully submitted,

CHARLES H. CARR,
United States Attorney;

JAMES M. CARTER,
Assistant United States Attorney;

WILLIAM STRONG,
Special Assistant to the United States Attorney;

WM. P. HAUGHTON,
Assistant United States Attorney;

Attorneys for Appellee.